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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. —.

HERBERT BROWNELL, JR., INDIVIDUALLY AS THE ATTORNEY GENERAL OF THE UNITED STATES AND WILLIAM P. ROGERS INDIVIDUALLY AS DEPUTY ATTORNEY GENERAL OF THE UNITED STATES, PETITIONERS

v.

LEO A. ROTH

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of Herbert Brownell, Jr., individually as the Attorney General of the United States, and William P. Rogers, individually as the Deputy Attorney General of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on July 16, 1954.

OPINIONS BELOW

The memorandum decision of the United States District Court for the District of Columbia (R. 41-

47) is reported at 117 F. Supp. 362. The opinion of the Court of Appeals Appendix A, *infra,* pp. 1A-5A has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 16, 1954, *infra,* p. 5A. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Lloyd-LaFollette Act, which provides that an employee in the classified civil service shall not be dismissed summarily by an officer of the United States, limits the power of the President to except particular positions or types of positions from that service.

2. If not, whether the pertinent Executive Orders (No. 9830, February 24, 1947, and No. 10463, June 25, 1953) removed respondent's position as an attorney from the classified civil service and made him subject to summary discharge.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Lloyd-LaFollette Act of August 24, 1912, as amended (37 Stat. 555; 62 Stat. 354, 5 U. S. C. 652) and the pertinent parts of Executive Orders 9830 of February 24, 1947 (12 F. R. 1259), and 10463 of June 25, 1953 (18 F. R. 3655), are set forth in Appendix B *infra,* pp. 6A-10A.

STATEMENT

The basic problem involved in this petition is the effect of a series of Executive Orders upon the

civil service rights under the Lloyd-Follette Act of non-veteran government lawyers or, conversely, the impact of that Act upon the President's power to except positions from the competitive civil service.[1] Presentation of the issues will be facilitated by a brief outline of the pertinent Orders, preliminary to a statement of the particular facts bearing on respondent's discharge.

a. *Attorneys and the competitive civil service.* In apparent recognition of the fact that the aptitude of a person to perform the duties and functions of a government attorney cannot be effectively determined by the customary type of civil service examination,[2] attorneys' positions in the United States government service were excepted at least as early as 1903 from the requirement of competitive examinations.[3] Beginning in 1938,

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[1] The pertinent parts of the Lloyd-LaFollette Act (*infra*, pp. 6a-7a) provide that no person in the classified civil service of the United States shall be removed except for such cause as will promote the efficiency of the service and for reasons given in writing. In case of a removal, the employee must be given notice of the charges, furnished with a copy thereof, given a reasonable time to answer them, and be furnished with a written decision. In short, the Lloyd-LaFollette Act protects employees coming within its scope from summary or arbitrary dismissal.

[2] See, *e.g.*, Report of President's Committee on Civil Service Improvement, H. Doc. No. 118, 77th Cong., 1st Sess. (hereafter referred to as H. Doc. No. 118) p. 31.

[3] Civil Service Rules of March 20, 1903, Schedule A, 20th Report of the Civil Service Commission 42, 62. See also 30 Op. A. G. 181, 182. See also Executive Order of November 2, 1896, 18th Report of the Civil Service Commission 279, 280, exempting from the requirement of examinations "attorneys or assistant attorneys * * * whose main duties are connected

there were a number of new attempts to meet the problem of qualifying professional personnel. Executive Order 7916 of June 24, 1938, 3 F. R. 1526, scheduled to take effect on February 1, 1939, was designed to subject virtually all non-policy-making government positions—including attorneys' positions—to the requirement of competitive examinations. On January 31, 1939, however, Executive Order 8044 (4 F. R. 497) suspended Executive Order 7916 with respect to professional and scientific positions and appointed a committee, commonly referred to as the "Reed Committee", to "make a comprehensive study of methods of recruiting, testing, * * * personnel for the positions to which this order relates * * *."

The Reed Committee submitted its report in February 1941.[4] In the meantime, Title I of the Ramspeck Act of November 26, 1940 (54 Stat. 1211, 5 U.S.C. 631a, 631b), had authorized the President to cover into the classified civil service any office or position in or under the executive department. Executive Order 8743 of April 23, 1941 (6 F.R. 2117), created a Board of Legal Examiners charged with the duty "to promote the development of a merit system for the recruitment, selection, appointment, promotion, and transfer of attorneys in the classified civil service." Pursuant

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with the management of cases in court." Until superseded by the Civil Service Rules of May 6, 1896 (18th Report of the Civil Service Commission 269), Rule XIX of the original Civil Service Rules of May 7, 1883 (18th Report of the Civil Service Commission 163, 167) had excepted "persons whose employment is exclusively professional."

[4] See H. Doc. No. 118, *supra*, p. 3, fn. 2.

to this Order, persons holding attorney positions could acquire classified civil service status by taking a non-competitive examination prescribed by the Civil Service Commission with the approval of the Board of Legal Examiners.

Congress, however, refused to appropriate funds for the continued operation of the Board of Legal Examiners or of its successor, the Legal Examining Unit in the Civil Service Commission.[5] This in effect prohibited civil service examinations for attorney positions.[6] As a result, President Truman issued Executive Order 9830 of February 24, 1947, 12 F. R. 1259 (*infra*, pp. 7A-10A), which again excepted attorneys' positions from the competitive service and restored them to Schedule A, in which

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[5] In 1942 the House approved an appropriation of funds for the Board of Legal Examiners in the Independent Offices Appropriation Act, 1943 (56 Stat. 392, 396), only on an understanding that appropriations for future years would be dependent upon the passage of a substantive law authorizing the Board (88 Cong. Rec. 5441-52). In 1943 a bill authorizing the Board of Legal Examiners was passed by the House (89 Cong. Rec. 3565) but not by the Senate (90 Cong. Rec. 2662). In the Independent Offices Appropriation Act for the fiscal year 1944 and for each year thereafter Congress had expressly prohibited the use of funds for operation of the Board of Legal Examiners or its successor, the Legal Examining Unit in the Civil Service Commission, established pursuant to Executive Order 9358 (July 1, 1943, 8 F. R. 9175). 57 Stat. 169, 173; 58 Stat. 361, 364; 59 Stat. 106, 109; 60 Stat, 60, 63; 61 Stat. 585, 590; 62 Stat. 176, 180; 63 Stat. 631, 635; 64 Stat. 697, 701; 65 Stat. 268, 271; 66 Stat. 393, 397; 67 Stat. 298, 300. See also H. Rep. 109, 78th Cong., 1st Sess., p. 6; H. Rep. 1023, 78th Cong., 2d Sess., pp. 5-6; S. Rep. 730, 78th Cong., 2d Sess., p. 7; H. Rep. 1642, 78th Cong., 2d Sess.; 90 Cong. Rec. 2659-62.

[6] Civil Service Commission Departmental Circular No. 497, Supp. No. 2 (R. 39-40).

they had been listed before 1941 (§ 6.4, *infra*, p. 9A). The Order, however, gave incumbents continued protection against summary removal, providing that where a position in Schedule A was occupied by an attorney who had acquired competitive status as the result of the 1941 Order, he could be separated only pursuant to the Civil Service Rules and Regulations (§ 6.1(f), *infra*, pp. 8A-9A). Executive Order 10463 of June 25, 1953, 18 F. R. 3655 (*infra*, p. 10A), withdrew this reservation by directing that apart from the protection afforded by the Veterans' Preference Act removals from positions in Schedule A were not to be governed by Civil Service Rules and Regulations.[7]

b. *Respondent's positions in the government service and his removal.* Respondent joined the government service as an attorney in 1938 (R. 2, 31). On April 15, 1943, he was accorded civil service status under Executive Order 8743 of April 23, 1941 (*supra*, pp. 4-5) (R. 10-11, 31). He is

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[7] Executive Order 10440 of March 31, 1953, 18 F. R. 1823, had amended Section 6.1(f) to the effect that the Civil Service Rules and Regulations were not to apply to removals from positions listed in Schedule C (confidential and policy-making) while they continued to apply to removals from Schedules A and B, and renumbered it Section 6.4. Executive Order 10463 excepted positions in Schedules A and C from the application of the Civil Service Rules governing removals but continued this protection for Schedule B positions (obtained by non-competitive examinations).

A letter from the Chairman of the Civil Service Commission to the President submitting the draft of the Executive Order for approval stated, "Under this amendment the Civil Service Rules and Regulations will no longer apply to removals from positions listed in Schedule A of persons who have competitive status" (R. 35).

not a veteran. As we have shown above, Executive Order 9830 restored attorneys' positions to Schedule A in 1947, and Executive Order 10463, dated June 25, 1953 (*supra*, pp. 5-6), authorized the summary removal of government employees holding positions in Schedule A even if they held civil service status. On June 29, 1953, petitioners, the Attorney General and the Deputy Attorney General, advised the respondent that his employment in the Department of Justice would be terminated as of July 31, 1953 (R. 18). This action was taken because petitioners were of the opinion that respondent lacked the qualifications necessary for employment in the Department of Justice (R. 17-18, 34). Petitioners did not comply with the procedural requirements of the Lloyd-LaFollette Act (*supra*, p. 3, fn. 1) because they do not consider the Act, limited in its terms to persons in "the classified civil service of the United States," to be applicable to the removal of an employee from an excepted (Schedule A) position, even if he, personally, had civil service status.

Upon respondent's appeal to the Civil Service Commission, the Commission originally took the position that Executive Order 9830, returning attorneys' positions to Schedule A, did not affect the protection under the Lloyd-LaFollette Act of attorneys with civil service status who had served in attorneys' positions prior to May 1, 1947 (R. 20-21; see also R. 27-32).[8] Petitioners did not follow

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[8] After the decision of the District Court, the Civil Service Commission adopted the position taken by petitioners and

the recommendations of the Civil Service Commission (R. 21-22). Respondent then brought suit.

c. *The proceedings below.* The District Court[9] dismissed the complaint (R. 41-47). It held that respondent ceased to be in the "classified civil service," which alone entitles an incumbent to the protection of the Lloyd-LaFollette Act,[10] on May 1, 1947, when Executive Order 9830 placed attorneys' positions in Schedule A, and that there is nothing in the Lloyd-LaFollette Act limiting the general power of the President to include or except positions from the civil service. It also held that the President had the power to provide in Executive Order 10463 (*supra,* p. 6) that the Lloyd-LaFollette Act procedures need not be followed in the case of separations from excepted positions in Schedule A, even if the employee had competitive status. The Court of Appeals reversed (*infra,* pp. 1A-4A). It suggested that Executive Order 9830, issued in 1947, was not intended to apply to attorneys who at that time were already in the

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ruled that the provisions of the Lloyd-LaFollette Act do not apply to any employees holding Schedule A positions. See *infra,* pp. 23-24.

[9] The controversy is one arising under the laws of the United States and the jurisdiction of the District Court is apparently based on 28 U.S.C. 1331. The complaint, however, does not allege expressly that the matter in controversy exceeds the sum or value of $3,000.

[10] An employee is in the "classified civil service" if he meets two requirements. First, he must have competitive status, and, second, he must occupy a classified position. *Bailey* v. *Richardson,* 182 F. 2d 46, 53 (C.A. D.C.), affirmed by an evenly-divided Court, 341 U. S. 918.

classified civil service. It based its decision, however, on the far broader ground that the 1947 Executive Order could not have affected respondent, for, if it had, it would have "removed" him from the classified civil service without compliance with the procedural requirements of the Lloyd-LaFollette Act. In short, the Court of Appeals construed the Lloyd-LaFollette Act as a limitation upon the power of the President to except positions from the operation of the civil service laws.

REASONS FOR THE ALLOWANCE OF THE WRIT

The decision below holds that the Lloyd-LaFollette Act constitutes a limitation upon the "President's otherwise plenary control over appointments and removal" (*infra,* p. 4A), preventing him from excepting from the classified civil service those positions which are occupied by persons having competitive civil service status. The decision cannot be limited to a mere holding that Executive Order 9830 was not intended to apply to persons in respondent's position, for the restrictive interpretation of the Executive Order adopted by the Court of Appeals is premised upon the ground that the President lacks the authority to declassify positions occupied by incumbents who, personally, have status. Cf. R. 29-30.

The upshot of the decision is that once a position has been placed in the classified civil service, the incumbent acquires permanent tenure subject only to the possibility of removal for cause upon stated charges. Under the holding, it is immaterial that the President has determined that the position is

one which has a confidential or policy-determining character. Palpably, the decision has a significance which goes far beyond the particular facts of the individual case. It places a broad limitation upon the capacity of the Chief Executive to manage the federal establishment in the manner which he believes will best promote effective administration.

It is petitioners' view that the Court of Appeals erred in its construction of the Lloyd-LaFollette Act, and that the Act was not intended to restrict the traditional power of the President, dating back to 1871, to cover positions into the civil service or to except them from it. The Act, by its terms, was designed to prevent an "officer or employee" of the United States from removing summarily a subordinate employee occupying a position in the classified civil service. It does not follow that the Act was intended to limit the President's power to determine whether particular positions or types of positions are of such character that they should be included or continued in the classified civil service. The language of the statute and its legislative history, as well as the historical development of other enactments and regulations relating to the classified civil service, point to a contrary conclusion.

1. *The Lloyd-LaFollette Act does not constitute a limitation upon the President's power to classify and declassify civil service positions.*

The Lloyd-LaFollette Act (*infra*, pp. 6A-7A) provides in substance that no person *in the classi-*

fied civil service of the United States shall be removed unless (1) he has notice of the charges preferred against him, (2) he is furnished with a copy of such charges, (3) he is allowed a reasonable time to answer those charges, and (4) he is furnished with a written decision. This procedure was not followed at the time of respondent's discharge because, as petitioners construed the statute and executive orders, respondent was not then in the classified civil service of the United States.

In order to be in the classified civil service of the United States, an employee must meet two conditions. First, he must occupy a position in the competitive civil service, *i.e.*, a civilian position in the executive branch which is not excepted, and, second, he must have competitive status. Civil Service Rule I, 5 C. F. R. 1.1. *Bailey* v. *Richardson*, 182 F. 2d 46, 53 (C. A. D. C.), affirmed by an equally divided Court, 341 U. S. 918; see also *Deviny* v. *Campbell*, 194 F. 2d 876, 880 (C. A. D. C.), certiorari denied, 344 U. S. 826.

There is no dispute that respondent acquired competitive status in 1943 by virtue of a non-competitive examination (R. 10-11), and that he held that *status* at the time of his separation.[11] At that time, however, his *position*, having been excepted and placed in Schedule A, in 1947, by Executive

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[11] Just as the coverage of a position into the competitive civil service does not automatically give the incumbent competitive status, the exception of a position has no bearing on the competitive status of the employee then occupying it. 34 Op. A. G. 192; 40 Op. A. G. 440.

Order 9830, was no longer in the competitive service. Accordingly, respondent was not in the "classified civil service" at the time of his dismissal, and petitioners did not have to comply with the Lloyd-LaFollette Act procedures.

As the court below stated, a person in the classified civil service of the United States can be "removed therefrom" in two ways, either by action of the department head, *i.e.*, a dismissal from office, or by action of the President placing his position in the excepted schedules (a step which may or may not be followed by an actual separation).

The language of the Lloyd-LaFollette Act and the circumstances of its enactment show that the Act was directed only at the actual discharge of an employee from his office and not at the reclassification of his position by the President. The command of the Act addresses itself to "the officer or employee directing the removal or suspension without pay." The President is not an "officer or employee of the United States,"[12] and legislative debate plainly establishes that this term was intended to refer to the department heads as the persons having the power of removal (48 Cong. Rec. 10804). Moreover, there is nothing in the legislative history indicating that the Act, in addition to its imposition of procedural requirements upon removals by department heads, sought to limit the power of the President to reclassify the Civil Service.

The Lloyd-LaFollette Act, Section 6 of the

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[12] U. S. Constitution, Art. II, Section 2; *Steele* v. *United States*, 267 U. S. 505, 507.

Postal Appropriations Act of 1912, was enacted to remedy a number of grievances which had arisen in the Civil Service system. The first arose from the imposition by Presidents Roosevelt and Taft of a so-called "gag rule" which limited the right of government employees to petition Congress and enjoined them from furnishing information to Congress.[13] A second involved certain regulations issued by the Postmaster General to prevent the unionization of post office employees.[14] Congress was also concerned about removals of employees, without the assignment of reasons, as a means of enforcing the above policies.[15] Such summary removals "for the good of the service" had been made possible by President Roosevelt's suspension, in 1905,[16] of earlier Executive Orders issued by Presidents McKinley and Roosevelt giving civil service employees virtually the same protection as is now provided by the Lloyd-LaFollette Act.[17] And although President Taft had restored the earlier removal procedure by his Executive Order of Decem-

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[13] For the texts of the "gag orders" see 48 Cong. Rec. 4513. For the pertinent debate see 48 Cong. Rec. 4493, 4513, 4653-4, 4656-7, 4738-9, 5080, 5157, 5201-2, 5207, 5214, 5223-4, 5235, 5501, 5625-7, 5633-8.

[14] 48 Cong. Rec. 9952-3, 10670-77, 10727-33, 10790-804, 11755-6.

[15] 48 Cong. Rec. 9952, 10675.

[16] Twenty-second Report of the Civil Service Commission, p. 71.

[17] See President McKinley's Executive Orders of July 27, 1897, 18th Report of the Civil Service Commission 282, and May 29, 1899, *id.*, 286; Civil Service Rule of March 20, 1903, issued by President Theodore Roosevelt, Rule XII, par. 2, 20th Report of the Civil Service Commission, p. 60.

ber 9, 1911,[18] Congress apparently considered that a statute abolishing the "gag rule" and giving employees the right to join organizations might be ineffective unless the statute also prohibited the removal of employees without assignment of reasons (cf. 48 Cong. Rec. 9952). Congress accordingly, with minor changes, gave statutory status to the Civil Service Rules establishing a procedure for the discharge of employees.

The Lloyd-LaFollette Act thus constitutes no more than the continuation of earlier Civil Service Rules on a statutory basis. And those Rules governing the actual discharge of employees by department heads did not and could not have any bearing upon the President's power to classify and except civil service positions. Indeed, on the very days that President McKinley issued his Orders imposing upon department heads a procedure for removals from office, he issued other Orders excepting large numbers of positions from the Civil Service.[19]

Under the construction placed upon the Lloyd-LaFollette Act by the court below, the Civil Service Rules, when they were given statutory form, expanded in scope and affected the classification powers of the President. As indicated above, there is nothing in the legislative history of the Act which would lend support to this theory.[20] There are additional, persuasive reasons for rejecting it.

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[18] For the text of the Order see 48 Cong. Rec. 5626.

[19] *The History of the Federal Civil Service*, pp. 72-73.

[20] It cannot be said that this expansion follows from a necessary implication on the ground that the Lloyd-LaFollette Act

Under R. S. 1753 (5 U. S. C. 631) the President, since 1871, has had the authority

> to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof.

It was well established in 1912 that this statute conferred not merely the power to cover into the civil service but also to except positions previously covered into the civil service. See *supra*, p. 14, fn. 19; see also the statement of Rep. Gillett at 50 Cong. Rec. 5529. To hold that the Lloyd-LaFollette Act cut down the power to except, long exercised by successive Presidents, is to effect a repeal by implication, a result to be avoided in the absence of a "clear expression of that purpose by Congress." *U. S. Alkali Assn.* v. *United States*, 325 U.

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would be a dead letter if the President could help a department head to escape the limitation of the Act by excepting the position of an employee whose summary discharge is desired. This argument is not conclusive. First, there is a big difference between a routine discharge within a department and the invocation of Presidential aid. Congress may have felt that where the department head feels so strongly about an employee that he asks the President to except his position and the President accedes to his request the case has been scrutinized even more than under the procedure prescribed by the Act and that consequently the Presidential power need not be curbed. Second, Congress, although realizing that the President's power to except civil service positions constitutes a loophole, may have decided not to fill it for constitutional reasons (see *infra*, pp. 16-17).

The instant case obviously does not constitute a declassification with evasive purposes. Respondent's position was declassified in 1947; his discharge occurred six years later under another administration.

S. 196, 206; *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 456-457; *United States* v. *Borden Co.*, 308 U. S. 188, 198-199; *Rosenberg* v. *United States*, 346 U. S. 273, 294 (concurring opinion of Mr. Justice Clark).[21]

Moreover, as we interpret the Lloyd-LaFollette Act, it merely limits the power of a department head to remove an inferior officer whom he has appointed. Congress has this authority. *United States* v. *Perkins*, 116 U. S. 483; *Myers* v. *United States*, 272 U. S. 52, 160-161. The Court of Appeals' construction modifies the President's authority to declassify civil service positions. The assumption that Congress has the power to impose limitations upon the President's "general administrative control of those executing the laws"[22] raises weighty constitutional problems and is by no means as "clear" as asserted in the opinion, *infra*, at p. 4A. See, *e.g.*, *Myers* v. *United States*, 272 U. S. 52, 164; *Humphrey's Executor* v. *United States*, 295 U. S. 602, 627-628.[23] A construction of a statute which raises doubts as to its constitutionality is to be avoided

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[21] In *U. S. ex rel. Palmer* v. *Lapp*, 244 Fed. 380, 383 (N.D. Ohio), affirmed, 244 Fed. 377 (C.A. 6), the District Court stated that the Lloyd-LaFollette Act constituted an amendment to the basic civil service legislation by creating a new prohibition against removals in addition to the ones contained in Section 13 of the Act of January 16, 1883 (22 Stat. 403, 407), establishing the Civil Service Commission; the court did not suggest that the Act had any bearing on the President's power to classify under the 1871 statute.

[22] *Myers* v. *United States*, 272 U. S. 52, 164.

[23] Cf. *Flemming* v. *Stahl*, 83 Fed. 940 (C.C. W.D. Ark.), showing how carefully the Civil Service legislation was drawn to avoid any invasion of the constitutional powers of the President in this field.

when, as here, there is a reasonable alternative construction. See, *e.g., Driscoll* v. *Edison Light and Power Co.,* 307 U. S. 104, 115; *Guessefeldt* v. *McGrath,* 342 U. S. 308, 319; *United States* v. *Rumely,* 345 U. S. 41, 47; *United States* v. *Five Gambling Devices,* 346 U. S. 441, 448-452 (opinion of Mr. Justice Jackson).

In any event, a statute will not be construed as seeking to curtail the President's authority in matters involving control of the employees of the executive department unless it uses "very clear and explicit language." [24] The Lloyd-LaFollette Act does not contain an express limitation on the President's power to classify and except positions. This limitation may be found only by way of implication, and as we have shown above (*supra,* pp. 14-15, fn. 20), the implication is by no means clear or necessary. [25]

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[24] *Myers* v. *United States,* 272 U. S. 52, 162-163, 164; *Shurtleff* v. *United States,* 189 U. S. 311, 315; *Blake* v. *United States,* 103 U. S. 227, 235-237; *Morgan* v. *Tennessee Valley Authority,* 115 F. 2d 990, 993 (C.A. 6), certiorari denied, 312 U. S. 701.

[25] Only a year after the passage of the Lloyd-LaFollette Act, Congress indicated during the debates attending the Urgent Deficiency Appropriations Act of 1913 (38 Stat. 208) that the Lloyd-LaFollette Act did not affect the President's power to except positions from the civil service. The 1913 Act contained a rider excepting deputy internal revenue commissioners and deputy marshals from the classified civil service (38 Stat. 208, 5 U. S. C. 639; cf. *United States ex rel. Palmer* v. *Lapp,* 244 Fed. 377 (C. A. 6)). Congressmen opposing the statute pointed out repeatedly that it was unnecessary since the President had the power to except positions from the competitive civil service (50 Cong. Rec. 5388, 5529, 5538, 5540, 5569). No member of Congress took the position that the newly-enacted Lloyd-LaFollette Act had curtailed

We submit, in brief, that the statutory language, the origin of the separation provisions, and fundamental principles of statutory construction support the view that the Lloyd-LaFollette Act relates solely to the authority of department heads to discharge an employee from his office, and that it does not have, and was not intended to have, any bearing upon the President's authority to classify and except civil service positions.[26]

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this authority of the President. The rider passed not because it was felt that otherwise these positions could not be exempted, but because it was feared that President Wilson would not exercise his authority to except.

[26] Respondent can draw no support from the fact that Congress eliminated from the Department of Justice Appropriations Bill, 1954, a rider which would have explicitly authorized the Attorney General to terminate the employment of any officer or employee, notwithstanding the Lloyd-LaFollette Act or any other law. Cf. H. Rep. 341, 83d Cong., 1st Sess., p. 19. The Congressional debate shows that this action was taken for reasons which have no bearing on the problem at hand.

The main reasons for the elimination of the rider were, first, that its avowed purpose, the removal of "subversives and homosexuals," could be accomplished under the Act of August 26, 1950 (64 Stat. 476, 5 U. S. C. 22-1) and the recently issued Executive Order 10450 of April 27, 1953 (18 F. R. 2489) establishing the government employees' security program; second, that it jeopardized veterans' preference rights; and, finally, that it was not limited to professional employees, but covered clerical workers as well. 99 Cong. Rec. 4510-4514, 4517-4529, 4534-4543 (House); 5818-5828, 5833-5835, 5986-5990 (Senate). A Senate amendment offered by Senator Carlson which would have given the Attorney General the power summarily to remove employees in excepted positions was defeated on a point of order. The

2. *Executive Order 9830 removed respondent's position from the classified civil service and the protection of the Lloyd-LaFollette Act. The continued, non-statutory protection provided respondent by Section 6.1(f) of that Order was terminated by Executive Order 10463.*

The opinion below states (*infra*, at p. 3A), that "Order 9830 was apparently intended, when it was issued, not to apply to attorneys who, like Roth, were already in the classified civil service. Until the District Court decided this case, the Civil Service Commission interpreted the Order as not applying to these attorneys."

We submit that Executive Order 9830 excepted *all* attorneys' positions from the classified civil service and that it cannot be limited by interpretation to those positions occupied by non-status appointees or filled after the effective date of the order. Section 6.1(a) (*infra*, 7A-8A), plainly states that "the positions named in Schedules A and B, set out in § 6.4 * * * shall be excepted from the competitive service." The listing in Section 6.4

Senate refused to suspend the rule mainly because the measure would have destroyed veterans' preference rights. 99 Cong. Rec. 5986-5990. Thus, Senator Monroney, opposing the amendment, stated (*id.*, p. 5988):

> Any of the 310,000 in the excepted services can be fired today at the will of the Secretaries here involved, if they are not veterans. But if they are veterans they have a preference. The Carlson amendments would wipe out veterans' preference.

(*infra*, p. 9A) includes, without qualification "Attorneys."[27]

It is quite true that, subsequent to the issuance of Executive Order 9830 in 1947, respondent contined to enjoy protection against summary removal. But, in our view, he had that protection not by virtue of the Lloyd-LaFollette Act, which relates solely to removals from positions in the classified civil service, but solely by reason of Section 6.1(f) of the Order (*infra*, pp. 8A-9A), which stated:

> Whenever any position in Schedule A or B (§ 6.4) is occupied by a person having a competitive status, he shall be separated from such position only in accordance with the provisions of this order and the Civil Service Rules and Regulations.

In other words, the President, by Executive Order 9830, provided that certain persons in excepted positions would have protection similar to that enjoyed by the non-excepted (*i.e.*, those holding positions in the classified civil service) under provisions of the Lloyd-LaFollette Act and implementing rules and regulations. Only in this carefully limited sense is it correct to say that the Order "was apparently intended, when it was issued, not to apply to attorneys * * * like Roth * * *."

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[27] Analagous language in the Urgent Deficiencies Appropriation Act of 1913, declassifying deputy collectors and deputy marshals (see p. 17, fn. 25, *supra*), was held to be not merely prospective but, also, to affect incumbents with civil service status. *United States ex rel. Palmer* v. *Lapp*, 244 Fed. 380, 384 (N.D. Ohio), affirmed, 244 Fed. 377 (C.A. 6).

It is, of course, plain that the immunity from summary removal which the President conferred by Section 6.1(f) of Executive Order 9830 was terminable by the President at any time. It was in fact terminated, so far as persons in respondent's position are concerned, by the issuance of Executive Order 10463 (*infra*, p. 10A), which states:

> Except as may be required by the Veterans' Preference Act, the Civil Service Rules and Regulations shall not apply to removals from positions listed in Schedules A and C * * *.

As pointed out above, the unqualified language in Executive Order 9830 excepting attorney's positions negatives the suggestion that the order was not meant to apply to such positions when occupied by persons having civil service status. Indeed, the President, in issuing the order, must have interpreted it as removing the umbrella of the Lloyd-LaFollette Act from incumbents having civil service status; otherwise, there would have been no occasion to afford similar protection by promulgating Section 6.1(f). Moreover, the belief that the President's declassification powers were left unaffected by Lloyd-LaFollette was well established. That view, as noted above (p. 17, fn. 25) was reflected in Congressional debates, the session following the Act's passage. Moreover, in 1934, the Attorney General had issued a definitive ruling that the Act did not impair the President's authority to place positions in Schedule A and that

> the effect of such an order would be to take these positions out of the competitive classified

> civil service and place them among the class of positions which are excepted from competitive examination under the Civil Service Rules. The order would not deprive the occupants of the civil service status conferred upon them by Executive Order No. 5609, *but it would make their future service dependent upon the pleasure of the appointing officer.* [37 Op. A. G. 567, 569-570, italics supplied.] [28]

The position of the Civil Service Commission on the basic issue presented by this case has been ambiguous. Some of its pronouncements appear to rest on the premise that the protection of persons in respondent's position, subsequent to the 1947 declassification of attorneys, depended on Section 6.1(f) of Executive Order 9830. Others hold or appear to assume that protection continued to have a statutory basis. The Commission's present position accords with that of petitioners.

Following the issuance of Executive Order 9830, the Commission, by Departmental Circular No. 497, Supplements 2 and 3, dated April 15 and August 26, 1947, respectively (R. 39-41), advised the various department heads that no change should be made in the appointments of attorneys with competitive status. No reference is made to the Lloyd-

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[28] Similarly, 34 Op. A. G. 192 and 40 Op. A. G. 440 hold that the classification or exception of a position does not affect the incumbent's civil service status. These two opinions, however, do not deal with the question whether the Lloyd-LaFollette Act affected the President's plenary power to remove positions from the civil service.

LaFollette Act. Supplement No. 2 based the directive expressly on Section 6.1(f).

To our knowledge, Departmental Circular No. 694, dated December 12, 1952, was the first document to suggest that the Lloyd-LaFollette Act could protect persons holding excepted positions.[29] While letters of July 23, 1953, from the Chairman of the Civil Service Commission to the petitioner Rogers (R. 20-21) and of November 27, 1953, from the Executive Director of the Civil Service Commission to the respondent (R. 27-32) also take the position that the Lloyd-LaFollette Act conferred rights upon status employees which could not be affected by Executive Order, the Chairman of the Civil Service Commission had taken diametrically the opposite position in a letter addressed to the President. This letter, dated June 16, 1953, submitting proposed Executive Order 10463 to the President for his approval (R. 35), stated that

> * * * under the amendment the Civil Service Rules and Regulations will no longer apply to removals from positions listed in Schedule A of persons who have competitive status.

The Commission's most recent circular on the subject (Departmental Circular No. 744, March 3,

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[29] Departmental Circular No. 694 reads in pertinent part: * * * the rights of attorneys may be summarized briefly as follows: * * * Those nonveterans who were in attorney positions with competitive status before May 1, 1947 and have continued in attorney positions without a break in service are covered by the basic removal statute (the Lloyd-LaFollette Act of August 24, 1912).

1954, *infra*, pp. 11A-15A) states that the Lloyd-LaFollette Act does not apply to any excepted position.[30] Part 9 of the Civil Service Regulations, governing separations, has been amended accordingly (19 F. R. 1237).

CONCLUSION

The question at the root of this case—the relation of the Lloyd-LaFollette Act to the Presidential power to include or except positions from the civil service of the United States—is one of substantial public importance. The correctness of the decision below is, at the least, highly doubtful, and the matter is one which should be authoritatively determined by this Court. The petition for a writ of certiorari should be granted.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

SEPTEMBER 1954.

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[30] The Circular states in pertinent part: "*Removals.*—The Lloyd-LaFollette Act of 1912 and Part 9 of the Commission's Regulations do not apply to the incumbent of a position placed in Schedule A, B or C * * *."

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12126

LEO A. ROTH, APPELLANT

v.

HERBERT G. BROWNELL, JR., individually as The Attorney General of the United States, *et al.*, APPELLEES

Appeal from the United States District Court for the District of Columbia

Decided July 16, 1954

Mr. Herbert S. Thatcher, with whom *Messrs. J. Albert Woll, James A. Glenn,* and *James M. Fallon* were on the brief, for appellant.

Mr. Donald B. MacGuineas, Attorney, Department of Justice, of the bar of the Supreme Court of Illinois, *pro hac vice,* by special leave of Court, with whom *Mr. Paul A. Sweeney,* Attorney, Department of Justice, was on the brief, for appellees. *Mr. Edward H. Hickey,* Attorney, Department of Justice, entered an appearance for appellees.

Mr. Claude L. Dawson filed a brief on behalf of The Federal Employees Veterans Association, Inc., as *amicus curiae,* urging reversal.

Before EDGERTON, PRETTYMAN, and BAZELON, Circuit Judges.

EDGERTON, *Circuit Judge:* The plaintiff sued to be restored to a position, from which the defend-

ants had removed him, as Trial Attorney GS-14 in the Department of Justice. He appeals from an order of the District Court which granted the defendants' motion for summary judgment and dismissed the complaint. *Roth* v. *Brownell,* 117 F. Supp. 362.

Plaintiff was removed from his position, as of the close of business July 31, 1953, by a letter dated June 29, 1953. He had been given no notice that his removal was contemplated. He was given no reasons. He had served in various attorney positions in the executive departments since 1938. He had become a member of the classified civil service April 15, 1943, under the Ramspeck Act, 54 Stat. 1211, 5 U.S.C. 631a, b, and Executive Order 8743, April 23, 1941, 6 F.R. 2117. All this is undisputed.

The Lloyd-LaFollette Act, 37 Stat. 555 (1912), as amended, 62 Stat. 354 (1948), 5 U.S.C. 652(a), provides: "No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. . . ." The question is whether the plaintiff could be removed legally, as he was actually, without compliance with these requirements.

In 1947, when Roth had been in the classified civil service about four years, Executive Order No. 9830 was issued. It provides that the "positions named in Schedules A and B . . . shall be excepted from the competitive service. . . ." Schedule A includes attorneys. 12 F.R. 1259, 1263. It is agreed that "competitive service" and "classified civil service" are equivalent terms. But Order 9830 was apparently intended, when it was issued, not to apply to attorneys who, like Roth, were already in the classified civil service. Until the District Court decided this case, the Civil Service Commission interpreted Order 9830 as not applying to these attorneys.

The defendants assume, without directly asserting, that the plaintiff was not "removed" from the classified civil service in 1947 when Order 9830 "excepted" such "positions" as his from that service. But despite that assumption, the defendants say that by reason of Order 9830 the plaintiff ceased to be "in the classified civil service", with the result that he was not "removed" from it in 1953 either, and that there was therefore no need to comply with the Lloyd-LaFollette Act in removing him from the position he held in 1953. This is a paradox. Roth was once in the classified civil service, did not leave it voluntarily, and is now out of it. It follows that he was removed from it. We think he was removed from it in 1953. But whether he was removed from it in 1947 or in 1953 there was no compliance with the Lloyd-LaFollette Act. Neither the formula of "excepting" the kind of position a person holds, nor any other formula, can

obviate the requirement of the Lloyd-LaFollette Act that "No person in the classified civil service of the United States shall be removed . . . therefrom" without notice and reasons given in writing. The power of Congress thus to limit the President's otherwise plenary control over appointments and removals is clear.

It is immaterial here that the President has long been "authorized to prescribe such regulations for the *admission* of persons into the civil service of the United States as may best promote the efficiency thereof . . ." 16 Stat. 495, R.S. § 1753, 5 U.S.C. § 631. (Emphasis added.) Complete control over admissions does not obviate removal requirements of the Lloyd-LaFollette Act.

In our opinion the plaintiff is entitled to a summary judgment that his removal from his position was not in accordance with law and that he should be restored to the position.

Reversed.

[Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed July 15, 1954. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

APRIL TERM, 1954

No. 12,126

LEO A. ROTH, APPELLANT

v.

HERBERT G. BROWNELL, JR., individually and as The Attorney General of the United States, et al., APPELLEES

Appeal from the United States District Court for the District of Columbia.

Before: Edgerton, Prettyman, and Bazelon, Circuit Judges.

JUDGMENT

This cause came on to be heard on the original record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

Dated: July 16, 1954.

Per Curiam.

APPENDIX B

The Lloyd-LaFollette Act (Section 6 of the Postal Appropriations Act of 1912, 37 Stat. 555, as amended by the Act of June 10, 1948, 62 Stat. 354, 5 U. S. C. 652) provides in pertinent part:

> No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practical date with a written decision on such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the *officer or employee directing the removal or suspension without pay.* Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency, as shall also the reasons for reduction

in grade or compensation; and copies of the same shall be furnished, upon request, to the person affected and to the Civil Service Commission. This subsection shall apply to a person within the purview of section 14 of the Veterans' Preference Act of 1944, as amended [section 863 of Title 5], only if he so elects. [Italics supplied.]

Executive Order 9830 of February 24, 1947, 12 F. R. 1259, provides in pertinent part:

RULE VI—EXCEPTIONS FROM THE COMPETITIVE SERVICE

§ 6.1 *Positions excepted from the competitive service.* (a) Because of their confidential or policy-determining character, or because it is not practical to make appointments thereto through competitive examination, the positions named in Schedules A and B, set out in § 6.4 of this Rule shall be excepted from the competitive service. The Commission may, upon the request of an agency, determine that similar positions also should be excepted from the competitive service. Upon publication in the FEDERAL REGISTER of its determination excepting such positions from the competitive service, appointment thereafter may be made to such positions in the same manner as under Schedules A and B (§ 6.4). At the end of each fiscal year the Commission shall submit

to the President for review a list of the positions which it has excepted from the competitive service under this section during such year.

(b) Appointments to positions in Schedule A (§ 6.4 (a)) may be made without examination by the Commission.

(c) Appointments to positions in Schedule B (§ 6.4(b)) shall be subject to such noncompetitive examination as the Commission may prescribe.

(d) Appointment under either Schedule A or B (§ 6.4) shall not confer a competitive status. Final decision as to whether the duties of a particular position are such that appointment to it is authorized under Schedule A or B (§ 6.4) shall rest with the Commission. The Commission, with the concurrence of the agency concerned, may revoke in whole or in part any paragraph of Schedule A or B (§ 6.4): *Provided,* That such revocation shall be published in the FEDERAL REGISTER.

(e) An appointing officer in his discretion may fill any position in Schedule A or B (§ 6.4) or any position excepted from the competitive service by statute in the same manner as competitive positions are filled.

(f) Whenever any position in Schedule A or B (§ 6.4) is occupied by a person having a competitive status, he shall be separated from such position only in accordance with the pro-

sions of this order and the Civil Service Rules and Regulations. Whenever any position excepted from the competitive service by statute is occupied by a person having a competitive status he shall not be entitled to the protection against separation provided by such Rules and Regulations.

§ 6.2 *Assignment of excepted employees.* Any person appointed without competitive examination to a position in Schedule A or B (§ 6.4), or to a position excepted from the competitive service by statute, shall not be assigned to the work of a position in the competitive service without prior approval of the Commission.

§ 6.3 *Requirements of the Veterans' Preference Act.* The regulations issued by the Commission pursuant to section 11 of the Veterans' Preference Act shall apply to positions listed in Schedule A and B (§ 6.4) and positions excepted from the competitive service by statute.

§ 6.4 *Lists of positions excepted from the competitive service*—(a) *Schedule* A. The following positions are those excepted from the competitive service to which appointments may be made without examination by the Commission, and constitute schedule A of the Civil Service Rules:

* * * * *

(iv) Attorneys.

* * * * *

Executive Order 10463 of June 25, 1953, 18 F.R. 3655, provides in pertinent part:

> Section 6.4 of Civil Service Rule VI, as amended by Executive Order No. 10440 of March 31, 1953, is hereby amended to read as follows:
>
> § 6.4 *Removal of incumbents of excepted positions.* Except as may be required by the Veterans' Preference Act, the Civil Service Rules and Regulations shall not apply to removals from positions listed in Schedules A and C or from positions excepted from the competitive service by statute. The Civil Service Rules and Regulations shall apply to removals from positions listed in Schedule B of persons who have competitive status, however they may have been or may be appointed.

APPENDIX C

DC 744(1)

UNITED STATES CIVIL SERVICE COMMISSION

Washington 25, D. C.

March 3, 1954

DEPARTMENTAL CIRCULAR No. 744

(Departmental Circular No. 694 and Supplements 2 and 3 to Departmental Circular No. 497 are revoked)

TO HEADS OF DEPARTMENTS AND INDEPENDENT ESTABLISHMENTS

SUBJECT: Rights of employees occupying positions at the time they are listed in Schedule A, B or C

Following the decision of the District Court of the United States for the District of Columbia in the case of Roth vs. Brownell, the Attorney General by letter dated December 24, 1953, rendered an opinion that the legal interpretations set out in Departmental Circular 497, Supplements 2 and 3 are erroneous. He concurred in the Court's decision as correctly interpreting the Act of August 24, 1912.

Accordingly those departmental circulars and Departmental Circular 694 of December 12, 1952, which adopted the same interpretations, are revoked.

The instructions given below cover removal and

retention rights of *all* employees whose positions are listed in Schedule A, B or C.

Incumbents Move Automatically with Positions

When a position is placed in Schedule A, B or C the incumbent automatically moves with his position into the excepted service as of the date of publication in the FEDERAL REGISTER.

If the employee does not wish to remain in the poistion or if the agency does not wish to retain him in the position after it is listed as excepted under Schedule A, B or C, the agency is urged to use its discretion to assign or appoint him to another position for which he meets all the requirements. Indefinite employees occupying positions moved from the competitive to the excepted service may be reassigned to positions in the competitive service under Section 7.106 of the Commission's regulations, except where authority to use that section of the regulations has been withdrawn by the Commission. Employees with competitive status may be assigned to other positions in accordance with Civil Service Regulation 8.

Removals

The Lloyd-LaFollette Act of 1912 and Part 9 of the Commission's Regulations do not apply to the incumbent of a position placed in Schedule A, B or C, except that an employee with competitive status whose position is placed in Schedule B retains removal protection under Part 9 of the Commission's regulations.

The Commission will apply these principles to

any pending and future appeals of non-veterans whose positions have been listed in Schedule A or C, alleging that they were removed in violation of the Lloyd-LaFollette Act of 1912 or Part 9 of the Commission's regulations.

The applicability of Section 14 of the Veterans' Preference Act is not affected by the placement of a position in Schedule A, B or C. An employee with such protection may be removed from his position or reduced in rank or compensation only in accordance with the procedures in Section 14 of the Veterans' Preference Act and Part 22 of the Commission's regulations.

Section 14 is applicable to veterans in excepted positions who have completed a year of current continuous service. Placement of the veteran's position in Schedule A, B or C does not constitute a break in service for purposes of Section 14 and Part 22 of the Commission's regulations.

Retention Rights

In the event of reduction in force, employees in excepted positions compete only with other employees in the same competitive level in the excepted service. Such employees have no *right* to be reassigned in reduction in force to positions in other competitive levels. The preceding provisions hereafter apply to employees with competitive status whose positions have been moved from the competitive to the excepted service; this change is effective with respect to any reduction in force notice issued on or after the date of this circular.

Preparation of Standard Form 50

When an incumbent's competitive or excepted position is placed in Schedule A, B or C, the agency will prepare a Standard Form 50 to record the change. The nature of action will be shown as "Conversion to Excepted Appointment" under the authority of the appropriate subsection of the Schedule. The effective date of the change will be the date of publication in the Federal Register of the inclusion of the position in Schedule A, B or C.

Where the Form 50 has not been prepared in accordance with these instructions, it should now be prepared showing the effective date as the date of publication in the Federal Register.

Federal Personnel Manual Changes

Appropriate instructions will be incorporated in the Federal Personnel Manual to reflect these changes.

Inquiries

Inquiries from agencies in the Metropolitan area of Washington, D. C., may be made to the Bureau of Departmental Operations, Appeals Examining Office; those relating to retention rights should be directed to Code 171, Extension 8808; those relating to removal protection to Extension 8803. Inquiries from agencies outside the Metropolitan area of Washington, D. C., may be made to the

appropriate regional or branch regional office of the Commission.

(S.) JOHN W. MACY, JR.,
Executive Director.

Distribution of Departmental Circulars No. 741, 742 and 743 was limited to Headquarters of agencies only.

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